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SUPREME COURT, U. S.

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IN THE
Supreme Court of the United States

October Term of 1967

No. 486

J. DAVID STERN,

Appellant

vs.

SOUTH CHESTER TUBE COMPANY,

Respondent

BRIEF FOR APPELLANT

DAVID FREEMAN,

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I.

CITATIONS TO OPINIONS BELOW

The Opinion of the District Court (A. 11a) is reported in 252 F. Supp. 329 (1966). The opinion of the Circuit Court of Appeals (A. 19a) is reported in 378 F. 2d 205 (1967).

Jurisdiction

II.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 25, 1967 (A. 27a). Petition for certiorari to this court was docketed on August 14, 1967 and was granted on October 23, 1967. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

III.

STATUTES INVOLVED

The Statutory provisions involved are 28 U.S.C. 1332, Section 1.

“The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between citizens of different states.”

The All Writs Act, 28 U.S.C. 1651, which provides that the lower Federal Courts

“... may issue all Writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”.

Section 34 of the Federal Judiciary Act, 28 U.S.C.A. Section 725:

“The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.”

The Pennsylvania Act, 15 Purdon's Statutes, Sec. 2852-308:

“Every shareholder shall have a right to examine, in person or by agent or attorney, at any

Statutes Involved

reasonable time or times, for any reasonable purpose, the share register, books, or records of account, and records of the proceedings of the shareholders and directors, and make extracts therefrom."

IV.

QUESTION PRESENTED

Does the United States District Court have jurisdiction to enforce the substantive right of a stockholder, established by state legislative enactment, to inspect corporate records?

Statement of the Case

V.

STATEMENT OF THE CASE

Petitioner, a resident of the State of New York, who owned stock of the respondent corporation valued in excess of Ten Thousand (\$10,000) Dollars, filed a Complaint (A. 3a) in the Eastern District of Pennsylvania, where the respondent was incorporated and maintained its business and offices, requesting the Court to issue an order permitting him to inspect the corporate records of the respondent. Jurisdiction of the Court was invoked under the provisions of 28 U.S.C. 1332(a). The District Court dismissed the Complaint on the ground that the relief sought was in the nature of a Writ of Mandamus which was beyond the jurisdiction of the District Court (A. 11a).

The Circuit Court of Appeals for the Third Circuit affirmed the opinion of the District Court with one of the three Judges who heard the case dissenting (A. 19a).

VI.
SUMMARY OF ARGUMENT

Pennsylvania provides that a stockholder may examine corporate records.

This suit, to force their exhibition, is between private parties for the protection of private rights and is therefore a civil action within the meaning of 28 U.S.C. 1332, Section 1, conferring jurisdiction on the District Courts in "civil actions".

It is not controlled by cases where the relief sought (mandamus) was the performance of an official duty by a public officer or the enforcement of an order of a regulatory commission. These were not considered civil actions, but requests for extraordinary relief, not within the civil jurisdiction of the District Courts.

The writer cannot find any case in which the Supreme Court held that the District Courts do not have powers to issue mandatory orders in private litigation.

The doctrine of *Erie vs. Tompkins*, 304 U.S. 64, requires the application of state law. If the action is within the jurisdiction of the State court, the Federal Courts have the same jurisdiction as to right and remedy unless there be some *positive* interdiction by Congress. There is no such positive denial by Congress in the instant case.

Procedural manipulation and incongruous results are vices to be avoided by the law. A decision, based on archaic technicalities without purpose, leads to anomalies set forth in the main argument.

VII. ARGUMENT

1. THIS IS A CIVIL ACTION WITHIN THE MEAN- ING OF JURISDICTIONAL STATUTE (28 U.S.C. 1332—SECTION 1)

The Commonwealth of Pennsylvania has created a substantive right and corresponding duty between private parties, viz., the right of a stockholder to inspect the corporate books. The right is enforceable at law in Pennsylvania by a writ which the State terms, a "Writ of Mandamus", and is enforceable in equity in conjunction with other relief.

15 Purdon's Statutes, Sec. 2852-308;

Strassburger vs. Philadelphia Record Company,
335 Pa. 485, 6 A. 2d 922;

Goldman vs. Trans-United Industries, 404 Pa. 288,
171 A. 2d 788;

Taylor vs. Eden Cemetery Company, 337 Pa. 203,
10 A. 2d 573;

Hagy vs. Premier Manufacturing Corp., 404 Pa.
330, 172 A. 2d 283;

Spang vs. Wertz Eng. Co., 382 Pa. 48, 114 A. 2d
143.

The Third Circuit now decides that a citizen of a foreign state may enforce this right only in the courts

Argument

of Pennsylvania, and that the Federal Courts are barred although all usual requirements for Federal jurisdiction are present.

It holds that the jurisdiction of the District Courts is limited to "Civil Jurisdiction", and that an original proceeding in Mandamus is not "Civil Jurisdiction" within the meaning of 28 U.S.C. 1332(a). This doctrine is based upon a misunderstanding of the first cases decided by this Court.

The cases of *McIntyre vs. Wood*, 7 Cranch 504, *M'Cluny vs. Silliman*, 6 Wheaton 598, and succeeding cases, decided that the Circuit Court (Now the District Court) had no power to issue a writ of mandamus commanding a state or federal official to do a ministerial act except to further the exercise of jurisdiction otherwise conferred. The Court held that the issuance of such a writ to an official was not an exercise of "Civil Jurisdiction".

In the context of the facts of these cases, the relief sought, and the reasoning of the Court, it should be obvious that the Court was thinking in terms of the descendant of the high prerogative writ, by which the King first, and later the Courts, controlled the conduct of the inferior courts and public officials.

"It is a writ, in England, issuing out of the King's Bench, in the name of the king, and is called a prerogative writ, but considered a writ of right; and is directed to some person, corporation or inferior court, requiring them to do some particular thing, therein specified, which appertains to their office or duty, and which is suppose to be consonant to right and justice, and where there is no other adequate specific remedy."

Argument

Kendall vs. United States, 12 Peters 524, at p. 614.

As society and economy become more complex, an enforcement process for mandatory acts in ordinary civil cases become necessary. Thus, the Courts fashioned the old prerogative writ to this purpose. It lost its former character and became ordinary civil process.*

It was in this fashion that the Commonwealth of Pennsylvania made use of the writ to enforce the statutory right of a stockholder to inspect books. It could have referred such actions to equity which has a technique for such enforcements, or it could have fashioned another remedy. This was unnecessary. The writ of mandamus was at hand as the traditional weapon in corporate affairs, stemming from the days when corporations were created by the King's franchise, and in a special sense (by way of monopoly, etc.), extensions in the exercise of the King's power. It followed that a prerogative writ directed against public officials could be directed against corporations and their officers. It was an easy transition to continue its use, although private business corporations had long lost all governmental attributes.

What then is this "Writ of Mandamus"? It is not the old prerogative writ. It is civil process, used in ordinary civil proceedings between private parties where performance is required.

* The Writ of Quo Warranto has undergone a similar transformation. And because it has, the District Courts have jurisdiction to issue such writ when it is civil in nature.

See *Wilder vs. Brace*, 218 F. Supp. 860, citing the *Ames* case.

Argument

Words have a mystique. We endow them with magical attributes vesting them with the essence of the objects they denote.

This is the basis of the Circuit Court's opinion. The word "Mandamus" was first used to describe the extraordinary prerogative writ directed against public officials. Because of this, the civil process it now describes (and since Rule 81b* the remedy of commanded performance) becomes an extraordinary remedy, outside the purview of the ordinary civil jurisdiction of the Federal Courts.

The following from the opinion of the Circuit Court of Appeals makes this obvious:

"The plaintiff argues that jurisdiction having been acquired by reason of diversity of citizenship and a requisite amount in controversy, the district court had authority to issue a writ of mandamus conformably to State practice. This argument is untenable. The jurisdiction of the district courts under Sec. 1332(a) of 28 U.S.C.A. is limited to 'civil actions.'¹ *Albanese vs. Richter*, 161 F. 2d 688 (3rd Cir. 1947). An original proceeding in mandamus is not a 'civil action' within the meaning of the said statute. *Insular Police Commission vs. Lopez*, 160

* The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed by these rules.

¹ "The phrase 'civil actions' has been substituted for the earlier language 'suits of a civil nature, at common law or at equity.' The change was not intended to enlarge the jurisdiction of the federal courts in cases of mandamus." *Marshall vs. Crotty*, supra, 627.

Argument

F. 2d 673, 677 (1st Cir. 1947), cert. den. 331 U.S. 855; *Marshall vs. Crotty*, supra. It is a special proceeding in which a court is called upon to exercise its prerogative power. . . ."

It is the position of the appellant that, although the Pennsylvania courts enforce the right of inspection by a writ termed "mandamus", which partakes of the nature of the prerogative writ only in that it requires the performance of an act, this action is one between private parties, for the enforcement of private rights, is essentially civil in nature, and not within the doctrine of the cases decided by the Supreme Court of the United States, which deal with forms of mandamus closely akin to the prerogative writ, viz., requiring public officials to perform their duties, or to levy taxes for the payment of bonds, or to pay debts out of public funds. There was dissent in the latter case, on the theory that though the action, in form, was against a public official, in essence it was merely process for the collection of a debt and therefore civil in nature (See opinion and dissent, *Rosenbaum vs. Bauer*, 120 U.S. 450).

In *Knapp vs. Lake Shore Railway Co.* (197 U.S. 536), the Court refused to issue mandamus against the railway to enforce an order of the Interstate Commerce Commission. This would not constitute "civil jurisdiction" or a "civil action" within the ordinary meaning of those terms.

There appears to be no case in which this Court has held that the District Courts do not have power to issue mandatory orders in private litigation. To so hold now, because the term "mandamus" has been extended to include actions, private in nature, as well as actions against

Argument

public officials, is to make obeisance to a word, at the expense of content and reason. It would undermine the intent of Congress, the purpose of diversity jurisdiction and ignore the requirements of modern business.

2. THE ERIE DOCTRINE CONFERS JURISDICTION BY VIRTUE OF THE APPLICATION OF SECTION 34 OF THE FEDERAL JUDICIARY ACT (28 U.S.C.A. 725)

Erie Railway Co. vs. Tompkins, 304 U.S. 64, held that (p. 78):

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied is the law of the State."

It would follow, that unless there is some direct prohibition by Congress, that the District Courts should be able to enforce the law which they are required to apply:

Judge Ganey dissenting in the court below said:

"In my judgment, in construing these diversity cases, the courts have never accorded *Erie R.R. vs. Tompkins*, 304 U.S. 64, its full authority in this field, nor have they given proper acceptance to its complete potential. It is submitted that a proper basis for allowing the issuance of the writ is to give full effect to the power of a federal court expressed therein. This for the reason that in the growing complexities of modern business, through mergers and absorptions of corporate entities which spread over many states, the federal courts should not be shackled from granting relief as here, but should embrace, within the orbit of *Erie R.R. vs. Tompkins*, *supra*, an expansive reach in order to meet the growing needs of the substantive rights embodied in state

Argument

statutes, as in our case, and, even in its absence, fashion a remedy of its own under its inherent equity power.

The instant case provides an excellent example for, under the Pennsylvania Business Corporation Law, a substantial civil right is given to a shareholder. Further, this substantial civil right given by Sec. 308(b) of the Business Corporation Law of May 5, 1933, P. L. 364, is properly enforceable in Pennsylvania by the legal action of mandamus. *Hagy vs. Premier Manufacturing corp.*, 404 Pa. 330. In a federal court, under *Erie R.R. vs. Tompkins*, *supra*, sitting as a state court, the granting of the writ exercises no involvement of the All Writs Act or its successor statutes and, accordingly, no power to do so flows therefrom, for, irrespective of it, the court has full power to give effect to a substantial right given by a state and to give to it the enforcement thereof granted by the highest decisional court in that state, and, accordingly, draws on no federal power for its enforcement, but gives effect to authority rooted in state law and thereby merely follows state procedure."

3. THE OPINION OF THE CIRCUIT COURT LEADS TO THE VICE OF PROCEDURAL MANIPULATION

The Third Circuit has disregarded the spirit and dicta of its own cases, and its opinion forces peculiar distinctions upon the courts leading to results without basis in justice or practicality.

For example: If "A" owns stock and is entitled to the certificate and everyone admits it, a District Court cannot order the delivery. It is mandamus. But if the title is in issue, the Court can determine the title and then order the delivery. It is a suit to try title. In the first instance, a citizen of a foreign state must subject himself to a local court—in the second, he may apply to the federal courts. The end result, the delivery, is the relief sought in both cases. See *Hertz vs. Record Publishing Company*, supra.

In *Susquehanna Corporation vs. General Refractories*, 250 F. Supp. 797 (cited by Judge Ganey), and in *Steinberg vs. American Bantam Car Co.*, 76 F. Supp. 426, 173 F. 2d 179, injunctions were sought and granted enjoining meetings until corporate records were made available.

It is implicit in petitioner's request for inspection, that he seeks to determine what he must do to protect his holdings. This includes a determination of the position he should take at corporate meetings and communications of that position to other stockholders.

Argument

Must he then first seek to enjoin a meeting before he can examine records?

A result, so archaic, has no place in modern law.

VIII.

CONCLUSION

Appellant therefore requests that this case be remanded to the court below with instructions that it be heard and considered on its merits.

Respectfully submitted,

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Attorney for Appellant.